Filed 9/8/03 Walker v. Washington Mutual Bank Ca4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUDITH WALKER, Plaintiff and Appellant, v. WASHINGTON MUTUAL BANK, F.A., Defendant and Respondent.	E033003 (Super.Ct.No. INC029512) OPINION

APPEAL from the Superior Court of Riverside County. Christopher J. Sheldon, Judge. Affirmed.

Judith Walker, in pro. per., for Plaintiff and Appellant.

Hahn & Hahn, William S. Garr and Todd R. Moore for Defendant and Respondent.

Plaintiff Judith Walker (Walker) appeals from an order dismissing her action against Washington Mutual Bank, F.A. (Bank) because she failed to furnish security as

required by the vexatious litigant statutes (Code Civ. Proc., § 391 et seq.[1]). She challenges the order (judgment of dismissal) contending (1) it was barred by the doctrine of collateral estoppel; (2) it is not supported by the evidence; (3) her action is not barred by the statute of limitations; and (4) the trial court erred in not entering Bank's default. Finding no merit to her contentions, we affirm the order of dismissal.

PROCEDURAL BACKGROUND AND FACTS[2]

Eighteen months prior to this action, on December 11, 2000, Walker initiated a similar action in the United States District Court, Central District of California (District

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[2] By order filed February 26, 2003, we reserved decision on Walker's request to take judicial notice of the following: exhibit A - Bank's motion for security and control of vexatious litigant in her federal action against Bank; exhibit B - her opening brief in her appeal to the Ninth Circuit of her federal action against Bank; exhibit C - the transcript of the March 4, 2002, hearing in her federal action against Bank; and exhibit D - Discovery papers served on her in this action against Bank. We now grant Walker's request for judicial notice of exhibits A, B, & C. (Evid. Code, § 452, subd. (d).) The request is denied as to exhibit D.

Also on February 26, 2003, we reserved decision on Walker's supplemental request to take judicial notice of the following: exhibit A - her petition for rehearing en banc filed in the Ninth Circuit in her federal action against Bank; and exhibit B - the December 11, 1998, minutes of the mandatory settlement conference in a state action involving Sergio A. Retamal. We now grant Walker's request for judicial notice. (Evid. Code, § 452, subd. (d).)

By order filed May 8, 2003, we reserved decision on Bank's request to take judicial notice of the following: exhibit A - Ninth Circuit docket sheet in Walker's federal action against Medical Board of California; exhibit B - Ninth Circuit docket sheet in Walker's federal action against Bank; exhibit C - Ninth Circuit's opinion in Walker's appeal in her federal action against Bank; and exhibit D - Walker's motion to withdraw claims in her federal action against Bank. We now grant Bank's request for judicial notice. (Evid. Code, § 452, subd. (d).)

Court), regarding the 1997 repossession of her Palm Desert home. Walker sued Bank in case No. CV-00-12931 (Walker v. Bank) alleging, inter alia, that Bank's predecessor-in-interest, Coast Federal Bank (Coast) defrauded her, engaged in racketeering, violated the Federal Truth-In-Lending Act and converted her property. On April 30, 2001, Walker filed an amended complaint and mailed a copy thereof to Bank on May 21, 2001.

During the first six months following the filing of the amended complaint, Walker filed 13 motions and/or requests for judicial action.[3] Because of the significant number of motions and/or requests for judicial action filed in a short period of time, and Walker's history of filing actions which, for the most part, were dismissed, Bank filed a motion for security and control of vexatious litigant in February 2002. On March 4, at the hearing on Bank's motion, the District Court stated: "I am not declaring you to be a vexatious litigant now as far as future lawsuits are concerned, but you're getting right at that border.

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[3] They include: (1) Bank's default in June 2001; however, Bank successfully moved to set aside the default on July 3; (2) motion for entry of default judgment on July 21, 2001, which the district court denied; (3) ex parte motion to continue hearing on Bank's motion to set aside default until after her motion for entry of default judgment could be heard which the district court denied; (4) motion for reconsideration of decision to set aside default was denied; (5) motion to force compliance with an alleged California state family court "business records subpoena" which was denied on October 3, 2001; (6) motion to strike Bank's answer as it applied to her state law claims which was denied; (7) motion to strike Bank's affirmative defenses of laches, estoppel and waiver, which was denied; (8) motion to strike Bank's affirmative defense of "failure to mitigate" which was also denied; (9) motion for summary judgment which was denied; (10) motion for continuance and request for sanctions against bank for discovery abuse found moot; (11) motion to strike all of the testimony in support of Bank's motion for summary judgment and in support of Bank's opposition to Walker's motion for summary judgment found moot; (12) motion to strike Bank's offered testimony found moot; and (13) second

[footnote continued on next page]

[¶] Some other judge, if you file another lawsuit, is going [to] say, 'Why didn't somebody put a halt to it somewhere along the line?'" Although the District Court did not declare Walker to be a vexatious litigant, it did order her not to file any additional motions without prior leave of court.

On March 1, 2002, approximately 18 months after Walker filed her federal action, Bank obtained summary adjudication of all of claims, save conversion which was dismissed without prejudice on May 6, 2002, upon Walker's motion.

On July 11, 2002, Walker initiated this action. On September 3, Bank moved for an order (1) declaring Walker a vexatious litigant, (2) requiring her to provide security for Bank's anticipated attorney fees and costs, and (3) requiring her to obtain prefiling approval before initiating any new litigation in California. In support of this motion, Bank argued that Walker had "filed at least five litigations *in propria persona* within the last seven years that have been finally determined adversely to her, [she] has repeatedly filed unmeritorious motions in recent litigation with [Bank], and [she] has no reasonable probability of prevailing in this action against [Bank]."

On September 5, 2002, Walker requested the entry of Bank's default. Hearing on Bank's motion was held on September 30. The matter was taken under submission. On October 11, a formal order was entered which stayed Walker's request for entry of Bank's default until she obtained a $60,000 security in favor of Bank for its anticipated

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[footnote continued from previous page]
motion to force compliance with an alleged California state family court "business records subpoena" which was denied.

attorney fees and costs. On October 25, another order was entered which required Walker to provide evidence of having furnished security in an amount not less than $60,000 within 10 days of the date of the order or else her complaint would be dismissed pursuant to section 391.4. The order further provided that Walker "may not file any new litigation in the courts of this state *in propria persona* without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed." Walker failed to provide proof of security and the trial court dismissed her action on November 26, 2002.

COLLATERAL ESTOPPEL

"Section 391, subdivision (b)(1) defines a vexatious litigant as one who, in the relevant time period, 'commenced, prosecuted or maintained in propria persona . . . five litigations [other than small claims] that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.'" (*Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 221-222.)

In support its motion to have Walker declared a vexatious litigant, Bank introduced evidence of the 13 unsuccessful motions filed in the District Court in Walker v. Bank and no less than five lawsuits (see *infra*) which she has litigated in propria persona during the five years prior to this action and which were finally adjudicated adversely to her. (§ 391, subds. (b)(1) & (b)(3).) Having taken judicial notice of this evidence, the trial court found Walker to be a vexatious litigant.

Walker contends that the principles of collateral estoppel preclude Bank from relitigating the issue of whether she is a vexatious litigant because this same issue was previously determined adversely to the Bank by the District Court in Walker v. Bank. In essence, she claims that collateral estoppel principles preclude the filing of another vexatious litigant motion after she has successfully defended a previous one. We find Walker's contention to be without merit.

"'Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding. [Citations.]' [Citation.] However, collateral estoppel is not mechanically applied, and in each case the court must determine whether its application will advance the public policies which underlie the doctrine. [Citation.] Those policies are '(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation.' [Citation.]" (*Wright v. Ripley* (1998) 65 Cal.App.4th 1189, 1193.)

As noted above, the purpose of the collateral estoppel rule is not served by a strict and mechanical application. Specifically, the rule does not apply in a situation where a criterion of the vexatious litigant status determination has changed due to subsequent events. (Cf. *People v. Coronado* (1994) 28 Cal.App.4th 1402, 1408 ["[J]eopardy rules . . . do not apply in a situation where an aspect of the MDO determination which is capable of change (mental status) has changed."") In this case, each time Walker filed

another action or motion which was determined adversely to her, an aspect of the vexatious litigant status determination changed.

Moreover, although the District Court did not declare Walker to be a vexatious litigant, it did order her not to file any additional motions without prior leave of court. Furthermore, the District Court stated: "I am not declaring you to be a vexatious litigant now as far as future lawsuits are concerned, but you're getting right at that border. [¶] Some other judge, if you file another lawsuit, is going [to] say, 'Why didn't somebody put a halt to it somewhere along the line?'" This is just that lawsuit where some other judge has determined that enough is enough.

SUFFICIENCY OF EVIDENCE

Next, Walker challenges the sufficiency of evidence to support the trial court's finding. According to the record, Bank offered the following evidence in support of its motion:

Case No. 1 - On July 24, 1997, Walker sued Alan A. Sigel, et al., in the Superior Court of California, Riverside County, bearing case No. INC 002987. The action was for legal malpractice. Although Walker was initially represented by an attorney, on February 2, 1998, she substituted herself in place of her counsel. By June 19, she entered her request for dismissal with prejudice.

Case No. 2 - On July 1, 1998, Walker filed a cross-complaint against Sergio A. Retamal, in the Superior Court of California, Riverside County, bearing case No. INC-005857. However, on December 23, both sides entered into a stipulation to release and

withdraw allegations in their respective pleadings and dismiss the action and cross-action.

Case No. 3 - On September 14, 1998, Walker filed a complaint against the Medical Board of California, et al., in the Superior Court of California, Riverside County, bearing case No. INC-008882. The complaint alleged causes of action for defamation, discrimination, intentional infliction of emotional distress, and fraud. Walker filed a request for dismissal with prejudice on November 13, 1998.

Case No. 4 - On January 21, 1999, Walker sued Don C. and Gloria Reed for breach of contract for professional services. On March 1, she dismissed the action without prejudice.

Case No. 5 - On August 31, 2000, Walker sued the Medical Board of California, et al., in the United States District Court for the Central District of California, bearing case No. 00-CV-695. The action was ordered dismissed on September 28, 2001. Walker appealed the judgment to the Ninth Circuit Court of Appeal on October 15, 2001. Walker's appeal was ultimately dismissed on March 27, 2003.

Case No. 6 - On December 11, 2000, Walker sued Bank in the United States District Court for the Central District of California, bearing case No. CV-00-12931. On March 1, 2002, approximately 18 months after Walker filed her federal action, Bank obtained summary adjudication of all of claims, save conversion which was dismissed without prejudice on May 6, 2002, upon Walker's motion. Walker appealed and lost. In May 2003, she filed her petition for rehearing en banc.

Case No. 7 - On February 14, 2001, Walker sued Gil Garcetti, et al., in the United States District Court for the Central District of California, bearing case No. CV-01-1493. The complaint alleged causes of action for false arrest, violation of civil rights, violation of bankruptcy stay, fraud, negligence, defamation, failure to train, and racketeering. Defendant moved to dismiss the complaint in May and Walker was provided an opportunity to file an amended pleading. After failing to do so, on June 21, the court ordered the case dismissed with prejudice.

If a person "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing," then he or she is a vexatious litigant. (§ 391, subd. (b)(1).) The above evidence suggests that Walker is a vexatious litigant under subdivision (b)(1) of section 391. Walker disagrees.

Walker contends that her cross-action against Sergio A. Retamal (case No. 2) can not be considered because the dismissal was the result of a settlement between the parties. Likewise, she claims that the dismissal of her action against Alan A. Sigel, et al., (case No. 1) was the result of a confidential settlement. In her action against the Reeds, (case No. 4) she claims that she agreed to dismiss the complaint in exchange for payment of the money owed to her. When the Reeds defaulted, she filed suit again in April 2000 and obtained a default judgment in the amount of $41,005. As for her state action against

the Medical Board, (case No. 3) she claims that she dismissed it before anyone was served. Finally, she claims that her federal action against the Medical Board (case No. 5) is still on appeal.

Moreover, Walker complains that the trial court failed to consider her request for judicial notice which explained her actions in five of the above-referenced cases. Looking at the record, we note that her request for judicial notice in opposition to Bank's motion to have her declared a vexatious litigant was not signed, nor is there any indication it was served or filed. Moreover, the evidence she offered to the trial court, via her request for judicial notice, was apparently prepared a few days before the hearing and disregarded by the trial court because it was untimely.

Nonetheless, even if we were to consider Walker's untimely request before the trial court, we still find that five of the cases filed by her support a finding that she is a vexatious litigant. Specifically, case Nos. 1, 3, 5, 6, & 7. Although Walker claims that her case against Sigel (case No. 1) resulted in a settlement, she also references the fact that she obtained relief via a separate bankruptcy proceeding. As Bank points out, the fact that she "allegedly maintained two actions simultaneously in order to obtain the same relief . . . underscores her abusive and vexatious nature." She justifies these two actions by stating, "[a]s any law student knows, an action for disgorgement of excessive legal fees is totally different from legal malpractice [actions]." Despite her claim that the two actions were "totally different," the fact remains that once she was successful in the

bankruptcy action, she dismissed the other despite the fact that the two action were "totally different."

Notwithstanding the above, assuming for purposes of argument that there were not five cases to support a finding that Walker is a vexatious litigant, the record still contains sufficient evidence to support the trial court's decision. Bank introduced evidence of the numerous motions and/or requests for judicial action which Walker filed in her federal action against Bank. Additionally, in Walker's federal action against Bank, the District Court ordered her not to file any additional motions without prior leave of court. A vexatious litigant includes any person who "[i]n any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (§ 391, subd. (b)(3).) Here, the evidence of the numerous motions and/or requests for judicial actions clearly fits the description of subdivision (b)(3) of section 391.

Nonetheless, Walker claims that the motions filed in her federal action should not be considered because they "are not finally judged adversely to" her because they are on appeal. However, since the filing of Walker's opening brief, the Ninth Circuit Court of Appeal has entered its decision. On April 11, 2003, the federal appellate court filed its decision rejecting all of Walker's claims and affirming the judgment of the District Court. Accordingly, the motions have been "finally judged adversely to" Walker. Although Walker has filed a petition for rehearing en banc, we find such action irrelevant. As

Bank points out, section 391, subdivision (b)(3), contains no finality requirement. Instead, it only requires a finding that the litigant "repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (§ 391, subd. (b)(3).)

Based on the above, we find sufficient evidence to support the trial court's finding.

STATUTE OF LIMITATIONS

Pursuant to section 391.3, "[i]f, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix." Here, the trial court found Walker to be a vexatious litigant and ordered her to provide security in the amount of $60,000. On appeal, she contends the trial court erred in its order because her conversion action is not precluded as a matter of law, i.e., it is not barred by the applicable statute of limitations.

Whether or not Walker's claim is barred by the applicable statute of limitations depends on whether she voluntarily dismissed her claim in the federal action, or whether it was dismissed by action of the District Court. According to the District Court's docket sheet, Walker initially moved to dismiss her state claims on April 12, 2002. However, on April 22, 2002, Walker filed a withdrawal of her motion to dismiss claims. This entry on

the docket sheet suggests that Walker withdrew her request to dismiss her conversion action, and thus any subsequent dismissal was by order of the District Court.

On April 16, 2003, Bank requested this court take judicial notice of Walker's actual withdrawal motion. We granted the request. According to that withdrawal motion, Walker withdrew "her motion for voluntary dismissal of the claims with prejudice, [and] reiterate[d] her request to dismiss the state claim for conversion without prejudice . . . . According to Walker's motion, she withdrew her request to dismiss all her state claims save the one for conversion. Based on this evidence, it is clear that Walker voluntarily withdrew her claim for conversion.[4]

Section 338, subdivision (c), provides that a cause of action for conversion must be asserted within three years of accrual of the claim. Here, Walker alleged that Bank converted her property on December 11, 1997. Thus, she was required to file her claim by December 11, 2000. She did so by filing her federal action. However, she subsequently moved to dismiss her conversion claim without prejudice. The action of moving to dismiss "'. . . leaves the situation as if the [federal court] action had never been filed.' [Citation.] Therefore, if a plaintiff seeks to refile the dismissed claim, he or she may do so, but only within the remaining time period permitted by the relevant statute of limitations. In other words, the statute of limitations is not tolled during the pendency of

[4] We find Walker's claims that the "last remaining claim for conversion was dismissed by the federal court, not by [her]" and that she "merely prepared the motion at the behest of the Judge" to be disingenuous. There is nothing in the record to support either claim.

a case that is voluntarily dismissed. [Citations.]" (*Beck v. Caterpillar Inc.* (C.D.Ill. 1994) 855 F.Supp. 260, 264.)

Having dismissed her conversion claim in the federal action, the applicable statute of limitations was not tolled during the pendency of the case. Thus, she could only file her claim in state court if she could do so within the applicable statutory time. Here, that time ran out on December 11, 2000. Because there was no tolling during the pendency of her federal action, she was unable to file her claim for conversion in the state court following her request for dismissal. Accordingly, we find no error in the trial court's order requiring Walker to provide security in the amount of $60,000.

FAILURE TO ENTER BANK'S DEFAULT

Finally, Walker faults the trial court for failing to enter Bank's default upon her request.

On September 3, 2002, Bank filed its motion to have Walker declared a vexatious litigant. On September 5, Walker requested the entry of Bank's default. Section 391.6, in relevant part, provides that "[w]hen a motion pursuant to Section 391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, until 10 days after the motion shall have been denied, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof." Based on section 391.6, Walker's action against Bank was stayed on September 3. Thus, the trial court was without power to act on Walker's request for entry of default.

DISPOSITION

The judgment is affirmed. Bank is to recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

WARD
J.

GAUT
J.